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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEONARD WESTON BYERS, JR.,

Plaintiff,

Civil No. 07-1777-HO

v.

ORDER

MIKE WHEELER, et al.,

Defendants.

HOGAN, District Judge.

Plaintiff, an inmate in the custody of the Oregon department of Corrections, filed a complaint under 42 U.S.C. § 1983, alleging violations of his constitutional rights while he was a pre-trial detainee at the Lincoln County Jail (LCJ). Specifically, plaintiff alleges "excessive use of force and denial of grievance system, disrespect in violation of the

Eighth Amendment to the United States Constitution and confinement in segregation in violation of due process clause of the Fourteenth Amendment to the Constitution." Complaint (#2) p. 1. Plaintiff also alleges supplemental state tort claims for assault and battery and negligence. Plaintiff seeks money damages and declaratory and injunctive relief.¹

Before the court are the parties cross-motions for summary judgment (#27) and (#35).

Background: The facts giving rise to plaintiff's claims are as follows: On November 20, 2007, plaintiff attended an Alcoholic Anonymous meeting in the Lincoln County Jail Library. During the meeting defendant Wheeler observed plaintiff communicating with another inmate, Robert Williston. Defendant Wheeler alleges that after the meeting, while escorting the inmates back to their cells, he informed inmate

¹Plaintiff's request for injunctive relief has to do with his security classification at the Lincoln County Jail. Because plaintiff is no longer incarcerated in the Lincoln County Jail, the request that he be released from "Max Security and placed in General Population or G-1 - With restoration of all rights and privileges," Complaint (#2) p. 6, is moot. See, Taylor v. Rogers, 781 F.2d 1047, 1048 n. 1 (4th Cir. 1986); Moore v. Thieret, 862 F.2d 148, 150 (7th Cir. 1988); Magee v. Waters, 810 F.2d 451 452 (4th Cir. 1987); see also, Hood v. Crabtree 242 F.3d 381 (9th Cir. 2000). Moreover, plaintiff stated at his deposition that his inmate reclassification and loss of privileges is not part of this lawsuit. Declaration of Bruce Mowery (#29) Exhibit A, p. 11-12.

Robert Williston that he had been very disrespectful during the meeting and that "his actions were pathetic." Declaration of Mike Wheeler (#31) p. 2. Plaintiff alleges that defendant Wheeler "called plaintiff 'pathetic.'" Complaint (#2) p. 3.

Defendant Wheeler states that after plaintiff requested a "kyte" (standard inmate communication form) plaintiff "yelled obscenities at me all the while threatening me with injury and death." Declaration of Mike Wheeler (#31) p. 2. Defendant Wheeler further states that "(p)laintiff became increasingly agitated and refused several more direct orders to cell-in." Id. Plaintiff eventually entered his cell, but continued to ignore defendant Wheeler's orders and "continued making threats to injure (defendant Wheeler)." Defendant Wheeler eventually used his "tazer" to subdue plaintiff. Id. p. 3. Plaintiff was then escorted to "booking" by two "cover officers" who are not named as defendants in this action. Declaration of Mike Wheeler (#31) p. 3. Defendant Wheeler states that he had "no 'hands on' contact with plaintiff as he was escorted to the restraint chair in booking by the other officers." Id.

Plaintiff, describes the incident quite differently. Plaintiff alleges that he "repeatedly asked defendant Wheeler

for a grievance (form) for calling him names and disrespect;" that he "went to his cell as directed;" and that "defendant Wheeler came to plaintiff's cell while yelling at plaintiff with his tazer gun out and aimed at plaintiff threatening and provoking, instigating the situation." Complaint (#2) p. 3. Plaintiff alleges that defendant Wheeler entered his closed cell and "tazed (him), without provocation." Declaration of Plaintiff (#49) p. 1. Plaintiff further alleges that while being escorted defendant Wheeler "jammed his tazer in my neck and choked me with my shirt collar," shoved plaintiff in the elevator and "strangled" him by his shirt collar. Complaint (#2) p. 3.

Discussion: Defendant Russell is the Lincoln County jail commander/manager. She has the "responsibility for the day-to-day operation and management of the LCJ subject to the direction of Lincoln County Sheriff Dennis Dotson." Declaration of Jamie Russell (#30) p. 1. Plaintiff's only allegations concerning defendants Russell and Wheeler are as follows:

Plaintiff alleges "[t]he actions of defendants Wheeler, Russell and Dotson, allowing physical force against the plaintiff without need or provocation constituted the tort of

assault and battery under the law of the United States." Complaint (#2) p. 5.

Plaintiff further alleges: "The failure of defendants Russell, Dotson to take disciplinary or other action to curb the known assault of physical abuse of inmates by defendant Wheeler constituted deliberate indifference, and contributed to and proximately caused the above described violation of the Eighth Amendment rights and assault and battery." (sic) Id. Plaintiff has not alleged any facts that would support a finding that defendants Russell or Dotson had any knowledge of alleged "physical abuse of inmates by defendant Wheeler."

Plaintiff apparently seeks to hold defendants Russell and Dotson liable in their supervisory capacities. ["Lieutenant Jamie Russell and Sheriff Dotson are liable they control the facility and deputys." (sic)] Plaintiff's Memorandum of Law (#36) p. 3.

It is well settled that respondeat superior is not a proper basis for liability under 42 U.S.C. § 1983. Monell v. Dept. of Social Services of City of New York, 436 U.S. 658, 691-694 (1978); Rizzo v. Goode, 423 U.S. 362, 375-76 (1976); Harris v Roderick, 126 F.3d 1189, 1204 (9th Cir. 1997); Hansen v. Black, 885 F.2d 642, 645-46 (9th Cir. 1989); King v. Atiyeh,

814 F.2d 565, 568 (9th Cir. 1987). Absent an allegation that the named state officials were personally involved in the alleged deprivation of constitutional rights, a complaint under 42 U.S.C. § 1983 does not state a claim. See, Chuman v Wright, 76 F.3d 292, 294-95 (9th Cir. 1996); Foddie v. Coughlin, 583 F. Supp. 352, 356 (S.D.N.Y. 1984); Tinnell v. Office of Public Defender, 583 F. Supp. 762, 767 (E.D. Pa. 1984); Black v. Delbello, 575 F. Supp. 28, 30 (S.D.N.Y. 1983); Knipp v. Winkle, 405 F. Supp. 782, 783 (N.D. Ohio 1974). A supervisor may be liable based on his or her personal involvement in the alleged deprivation, or if there is a sufficient causal connection between the supervisor's alleged wrongful conduct and the alleged deprivation, Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989), but a "supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989), citing Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680-81 (9th Cir. 1984); Ortez v. Washington County, 88 F.3d 804, 809 (9th Cir. 1996); See also, Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994) (supervisory liability only when a)

actual or constructive knowledge of a pervasive and unreasonable risk of injury; b) deliberate indifference to or tacit authorization of the practice; and c) an affirmative causal link between inaction and the injury). Supervisory officials may also be liable if they "implement a policy so deficient that the policy 'itself is a repudiation of constitutional rights' and is 'the moving force of the constitutional violation.'" Redman v. County of San Diego, 924 F.2d 1435, 1446 (9th Cir. 1991), cert. denied, 112 S. Ct. 972 (1992) (quoting Hansen v. Black, supra, 885 F.2d at 646, in turn quoting Thompkins v. Belt, 828 F.2d 298, 304 (5th Cir. 1987)).

Plaintiff has not established any facts that would subject defendants Russell or Dotson to liability under these principles. There is no evidence in the record before the court that defendant Russell or defendant Dotson either personally participated in the alleged conduct giving rise to plaintiff's claims or had any reason to know of a risk of harm to plaintiff and were deliberately indifferent to such risk.

Plaintiff generally alleges a claim for "denial of grievance system," Complaint (#2), p. 1. However, the record reflects that plaintiff filed two grievances about

defendant Wheeler's alleged conduct within 24 hours of the November 20, 2007 incident. Plaintiff acknowledges that he received responses to those grievances. See, Declaration of Plaintiff / Statement of Facts (#49), p. 4.

Plaintiff alleges that "again on 11-23-07 I filed a third grievance ... claiming the same assault and battery that defendant Wheeler has committed against my persons (sic). I got no response." Id. p. 4-5.

Attached to plaintiff's Reply (#48) as Exhibit A page 3 of 3" is a copy of what might be the third grievance.

The copy is illegible and it is not possible to determine who it is addressed to.

Defendants exhibits do not reference any such third grievance. However, defendants have not specifically disputed this factual allegation. However, I find that this possible disputed fact is not material to the resolution of plaintiff's claim.

Plaintiff's "denial of grievance system" claim is apparently premised on the fact that he did not receive a response to the alleged third duplicate grievance concerning the conduct of defendant Wheeler.

However, as discussed below, plaintiff did not appeal or

pursue the initial grievances he filed concerning the incident. Moreover, the third grievance was not filed within 24 hours of the incident as required by the grievance procedure (discussed below).

I find that under these circumstances, defendants' failure to respond to a third duplicate grievance fails to state a due process claim for "denial of grievance system."

Plaintiff generally alleges a claim for "confinement in segregation in violation of due process clause," Complaint (#2), p. 1. However, plaintiff stated in his deposition that his reclassification, loss of privileges, and confinement in segregation are not part of this lawsuit. See, Declaration of Bruce Mowery (#29), p. 11-12. Therefore, if plaintiff intended to allege a due process claim arising out of his confinement in segregation, he apparently abandoned the claim.

Plaintiff's claim for "disrespect in violation of the Eighth Amendment" is apparently premised on the allegation that defendant Wheeler called him "pathetic."

Plaintiff was a pre-trial detainee while incarcerated at the LCJ. Therefore, his claims are governed by the Due Process Clause rather than the Eight Amendment. See, Carnell v. Grimm, 74 F.3d 977, 979 (9th Cir. 1996); Berg v. Kincheloe,

794 F.2d 457, 459 (9th Cir. 1986).

In any event, plaintiff's allegation that defendant Wheeler insulted him fails to state a claim cognizable under 42 U.S.C. § 1983. See, Oltarzewski v. Ruggiero, 830 F.2d 136 (9th Cir. 1987); Freeman v. Arpaio, 125 F.3d 732, 738 (9th Cir. 1997); Hoptowit v. Ray, 682 F.2d 1237, 1252 (9th Cir. 1982); Gant v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987); Hopson v. Fredericksen, 961 F.2d 1374 (8th Cir. 1992).

Plaintiff's principal claim is that defendant Wheeler violated his constitutional rights by using excessive force during the incident. As noted above, plaintiff and defendant Wheeler describe the November 20, 2007, incident very differently. However, every disputed factual issue is not "material" and if the resolution of a factual dispute would not effect the outcome of the claim, summary judgment may be proper. Arpin v. Santa Clara Valley Transp. Agency, 531 F.3d 912, 919 (9th Cir. 2001); see also, Nidds v. Shindler Elevator Corp., 113 F.3d 912, 916 (9th Cir. 1996).

In this case it is not necessary to resolve the factual disputes or determine whether or not such disputes create "genuine issues of material fact" because plaintiff did not exhaust administrative remedies with respect to his claims.

The Prison Litigation Reform Act (PLRA) provides: No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted. 42 U.S. C. § 1997e(a); Porter v. Nussle, 534 U.S. 516, 531-32; Booth v. Churner, 532 U.S. 731 (2001). In the Ninth Circuit, inmates are required to exhaust all grievance remedies prior to filing a 1983 action, including appealing the grievance decision to the highest level within the grievance system. Bennet v. King, 293 F.3d 1096, 1098 (9th Cir. 2002); McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002). Proper exhaustion requires compliance with the institution's deadlines and other procedural rules. Woodford v. Ngo, 548 U.S. 81 (2006).

The LCJ Inmate Handbook includes a detailed explanation of the institution grievance procedure. See Declaration of Jamie Russell (#30), p. 2. Ms. Russell states that all inmates are informed of the rules and procedures set forth in the Inmate Handbook and specifically that plaintiff has been an inmate at the jail on various occasions in prior years and that he "was well acquainted with the kyte/grievance

procedure." Declaration of Jamie Russell (#30), p. 4. At his deposition, plaintiff acknowledged that he was familiar with the "kyte/grievance" procedure. Declaration of Bruce Mowery (#29) p. 9-10.

The Inmate Handbook sets forth the grievance steps as follows:

Step I: Write a request to the staff person whose actions you are filing the grievance against. If your grievance is not resolved, go to Step II;

Step II: Write a request form to the shift supervisor stating your grievance. Include the name of the deputy who already answered the grievance. If the grievance is not resolved, go to Step III;

Step III: Write a request form to the jail manager by following the same procedure you did with the shift supervisor. If the grievance is not resolved, go to Step IV.

Step IV: Write a request form to the Sheriff by following the same procedure as you did with the jail manager. The Sheriff's decision will be final.

Declaration of Jamie Russell (#30), p. 2-3.

Inmates have 24 hours from the time of an incident to file a grievance and 24 hours from each time a grievance is denied to file the next step. Declaration of Jamie Russell (#30), p. 2.

The incident involving plaintiff and defendant Wheeler occurred on the evening of November 20, 2007. Plaintiff

submitted a grievance dated November 20, 2007, to an unidentified "Deput." (sic). Plaintiff stated in the grievance that defendant Wheeler "used excessive force and assaulted and tazed me because he was angry." On November 21, 2007, Sergeant Kellenberger responded "[n]o excessive force found. Byers failed to comply with Deputy directive and appeared hostile." Declaration of Jamie Russell (#30) Exhibit A.

Also on November 20, 2007, plaintiff submitted a second grievance to an unidentified "Deputy" alleging that defendant Wheeler had disrespected him by calling him "pathetic." The second grievance also mentioned that plaintiff was "tazed and assaulted" and that "Corperole Wheeler strangled me with my shirt." (sic) On November 21 Sergeant Kellenberger responded "see previous." Declaration of Jamie Russell (#30) Exhibit B.

Neither of the grievances plaintiff filed were addressed to defendant Wheeler as required by Step I of the grievance procedure. Plaintiff did not proceed to Step II as to either of the two grievances.²

²The second grievance cannot be considered as Step II of the initial grievance, because at the time plaintiff filed the second grievance, he had not received a response to the first. Moreover, the second grievance was not addressed to the shift supervisor and

As noted above, plaintiff alleges in his Statement of Facts (#49) at pages 4-5 that on November 23, 2007, he filed a third grievance "claiming the same assault and battery" by defendant Wheeler, and submitted an illegible copy of the third grievance as "Exhibit A - p. 3 of 3."

However, if plaintiff filed a third grievance concerning the November 20, 2007, incident on November 23, 2007, and if the third grievance was submitted to defendant Wheeler as required by the grievance procedure, the grievance was not filed within 24 hours of the incident as required by Step I of the grievance procedure and was therefore not proper.

Plaintiff contends that he did follow the grievance procedure and implies that he was unable to complete the grievance process because he was moved to a different facility. Declaration of Leonard W. Byers (#37) p. 2. However, plaintiff states that he was transferred on December 13, 2003, which I note is 23 days after the November 20, 2007, incident. Declaration of Plaintiff (#49), p. 5. I find that plaintiff had ample opportunity to pursue the grievance procedure before he was transferred out of the facility.

did not include the name of the deputy who responded to the previous grievance.

Based on the foregoing, I find that plaintiff did not exhaust his administrative remedies with respect to his claim that defendant Wheeler used excessive force against him on November 20, 2007. Accordingly, that claim is not properly before this court and fails as a matter of law.

Plaintiff generally alleges "the torts of assault and battery and negligence." Complaint (#2) p. 1. Plaintiff has not specifically alleged facts that would support the elements of such claims or that he complied with the requirements of the Oregon Tort Claims Act. However, to the extent that plaintiff's complaint can be construed as alleging claims for assault and battery and/or negligence, those claims are dismissed.

If the federal claim giving rise to the court's jurisdiction is dismissed before trial, supplemental state law claims may be dismissed as well. 28 U.S.C. § 1357(c)(3). Indeed some cases hold that the proper exercise of discretion *requires* dismissal of state law claims unless "extraordinary circumstances" justify their retention. Wren v. Sletten Const. Co., 654 F.2d 529, 536 (9th Cir. 1991); Wentzka v. Gellman, 991 F.2d 423, 425 (7th Cir. 1993). However, most courts hold that whether to dismiss supplemental claims is fully discretionary

with the district court. Schneider v. TRW, Inc., 938 F.2d 986, 993-994 (9th Cir. 1991), weighing factors such as economy, convenience, fairness and comity. Brady v. Brown, 51 F.3d 810 (9th Cir. 1995).


In this case I find that there are no relevant factors to justify this court's retention of jurisdiction over plaintiff's possible state tort claims. Accordingly, any such claims are dismissed.

Summary: Based on all of the foregoing, I find that there are no genuine issues of material fact remaining in this case and that defendants are entitled to judgment as a matter of law. Defendant's Motion for Summary Judgment (#27) is allowed. Plaintiff's 42 U.S.C. § 1983 claims are dismissed with prejudice. Plaintiff's ancillary state tort claims, if any, are dismissed without prejudice. Plaintiff's Motion for Summary Judgment (#35) is denied. Defendants' Motion to Strike (#52) is denied.

This action is dismissed.

IT IS SO ORDERED

DATED this 13th day of March, 2009.


 Michael R. Hogan
 United States District Judge